

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARK D. BERTRAM and LISA S.
BERTRAM,

Plaintiffs and Respondents,

v.

JANELLE WANTINK, etc.,

Defendant and Appellant.

B166924

(Los Angeles County
Super. Ct. No. BC258698)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Thomas L. Willhite, Jr., Judge. Affirmed.

Brian Shumake for Defendant and Appellant.

Fainsbert Mase & Snyder, Richard E. Wirick and Lisa K. Skaist for Plaintiffs and
Respondents.

INTRODUCTION

Defendant Janelle Wantink appeals from a judgment in favor of plaintiffs Lisa and Mark Bertram. We conclude that substantial evidence supports the judgment in plaintiffs' causes of action for fraud, negligence, breach of fiduciary duty, and negligent infliction of emotional distress. We find no merit to defendant's claims on appeal regarding the existence of a valid license or a valid easement which would make the judgment for plaintiffs erroneous. We affirm the judgment.

PROCEDURAL HISTORY

On September 27, 2001, plaintiffs Mark D. Bertram and Lisa S. Bertram filed a complaint against defendant Janelle Wantink (dba Shadow Hills Realty). The complaint contained causes of action for fraud, negligent misrepresentation, constructive fraud, breach of fiduciary duty, negligence, breach of the covenant of good faith and fair dealing, and negligent infliction of emotional distress.

The complaint arose from the Bertrams' purchase of property at 10451 Wheatland Avenue in Sunland, California. Wantink acted as real estate broker for the Bertrams and the sellers. The complaint alleged that Wantink knew of and failed to disclose defects or made misrepresentations about the property to the Bertrams.

Following trial, the jury's special verdict found that Wantink was negligent, Wantink's negligence caused economic damage to plaintiffs, and found that plaintiffs suffered \$70,000 in economic damages.¹ The jury found that Wantink breached her fiduciary duty to plaintiffs, the breach caused economic or non-economic damages to the plaintiffs and caused plaintiff Mark Bertram to suffer emotional distress, and that Mark Bertram suffered \$70,000 in non-economic damages as a result of Wantink's breach of her fiduciary duty. The jury found that Wantink engaged in negligent conduct toward

¹ As to negligent misrepresentation, the jury found that Wantink made false representations as to a past or existing material fact, but did not make those representations without reasonable grounds for believing them to be true.

Mark Bertram which caused Mark Bertram to suffer serious emotional distress, and awarded \$50,000 in non-economic damages to Mark Bertram for suffering serious emotional distress. The jury also found Wantink liable for fraud for making false representations of material fact, and that plaintiffs suffered \$68,475.96 in economic and non-economic damages as a result of Wantink's intentional misrepresentations.

The trial court entered judgment ordering plaintiffs to recover \$70,000 from Wantink for negligence, \$70,000 for breach of fiduciary duty, and \$68,475.96 for fraud, and ordering plaintiff Mark D. Bertram to recover \$50,000 for negligent infliction of emotional distress.

Defendant Wantink filed a timely notice of appeal.

FACTS

In late 1999 Lisa and Mark Bertram saw a house for sale at 10451 Wheatland in the Shadow Hills area of Glendale. They called the real estate agent's number on the sign. Defendant Wantink answered and arrived in about five minutes to show the Bertrams the property. The Wheatland property was entered through gates and by a long driveway paralleled by a white horse fence that went around a bend and up a hill to the house.

Wantink asked if they had a real estate agent, and said she could represent both the seller and the Bertrams as buyers. The Bertrams said that would be fine. Wantink gave them a tour of the house and property. Wantink stated that the property had been almost completely remodeled, and she had been instrumental during that remodel. Mr. Bertram asked Wantink about permits for the remodeling, and Wantink said all permits were proper.

Looking to the north, Mark Bertram asked Wantink where the property boundaries were. Wantink stated that a white fence along the driveway to the Wheatland entrance was the boundary. Wantink did not say that driveway was on land owned by Southern California Edison ("SCE"), then or ever. Wantink showed them a second, partly paved driveway to an entrance on McBroom Street.

Mr. Bertram also asked Wantink about the transmission lines. Wantink said the lines belonged to SCE. Pointing out the power lines, Wantink said: “that land that’s adjacent on the other side of the white horse fence that marks your property line is available for lease[.]” She stated that the seller had a lease with SCE, which was transferable to the buyer and cost \$80 a month. Wantink offered to provide a copy of the lease. Wantink did not tell the Bertrams that SCE could revoke the lease or that the lease required insurance and required the driveway to comply with SCE’s specifications.

Mr. Bertram asked why the fence had an opening by the house. Wantink said it was so trucks could have access, and she would have the opening in the fence closed for the Bertrams. Wantink did not say the trucks were SCE trucks, and made no indication that any trucks would have to obtain the Bertrams’ permission. Wantink did not use the term easement, right-of-way, or license.

The Bertrams spent about 35 minutes touring the property with Wantink. In this meeting, Wantink did not tell the Bertrams anything else about other work needed on the property before anyone moved in.

The Bertrams met Wantink the next morning. Wantink wrote up their offer to buy the Wheatland property and took the Bertrams’ deposit check. Wantink contacted the seller. The Bertrams accepted the seller’s counter-offer of \$675,000, and asked the seller for a \$2,500 credit toward closing costs.

The Bertrams signed the sellers’ real estate disclosure statement on December 12, 1999. Wantink had already signed the disclosure statement, as had one of the sellers, Sam Sepassi. Wantink did not review the contents of the disclosure statement or a buyer’s inspection advisory with the Bertrams, but gave them to the Bertrams for their signature.

The Bertrams visited the property four more times before escrow closed. Wantink was not present. Other than the garage door, they did not notice any construction items that had not been completed.

The Bertrams wanted a property inspection, and asked Wantink to meet the inspector because they were going out of town for the Christmas holiday of 1999. Wantink agreed to meet the inspector. On December 24, 1999, Mark Bertram talked with Wantink about a property inspection earlier that day performed by Summit Inspection. Wantink faxed a document to Mark Bertram, which stated that the inspection revealed three problems: (1) limited anchoring of sill plates to each other; (2) an exposed footing at the east kitchen wall; and (3) the chimney moved. Wantink said she would have a contractor give an estimate of repairs and would advise the escrow officer to withhold funds. Other than these items, the Bertrams were not aware of any problems in the house that needed to be repaired or finished.

In mid-January the Bertrams received the inspection report (Exhibit 30) and Summit Inspection's bill. The report notes charred wood and newer framing, apparently related to prior fire damage and repair. Before escrow closed, Wantink never informed the Bertrams that the house had fire damage and charred beams in the attic, that the property had drainage problems, or that some portion of the driveway was not on the Wheatland property that the Bertrams were purchasing.

Escrow closed December 28, 1999. Mark Bertram asked the escrow officer where the lease of the pasture land was, because Wantink had assured the Bertrams that it would be made available to them. The escrow officer did not have it and called Wantink, who talked to Mark Bertram. Wantink had previously stated it cost \$80 a month to lease the pasture land from SCE.

The Bertrams moved in on December 29, 1999.

In early January 2000, near the Wheatland entrance, the Bertrams met neighbors, Malcolm and Cassandra Chambers, who kept horses next to the entrance gates. Mark Bertram said to Mrs. Chambers that the Bertrams were going to lease land and the Chambers could let their horses on that property. Mrs. Chambers responded that she already leased that area. This was the first time the Bertrams heard this fact. Mrs. Chambers also said that much of the Bertrams' driveway was on land the Chambers

leased from SCE and the Chambers were not happy about that. The Bertrams thought the Chambers must be mistaken. Mark Bertram called Wantink, who said there was nothing to worry about.

On February 4, 2000, the Bertrams met with Wantink, four representatives of SCE, and Malcolm Chambers. An SCE representative, Mr. Greenwood, stated that SCE did not issue leases to its property, and at best might issue a temporary entry permit. Greenwood also stated that most of the driveway to the Bertrams' house was on land owned by SCE, which objected that a driveway was installed on its property without SCE's knowledge. Greenwood stated that the Bertrams could possibly receive a temporary entry permit to use the driveway if they re-installed the driveway to SCE's specifications so it would be wide and thick enough to support 40-ton trucks. Greenwood stated that SCE would require constant access to its property. Sepassi had placed sewer and gas lines across SCE's property without SCE's approval. Wantink said she knew nothing about this situation. The Bertrams responded that they would have to contact the sellers and find out what they could do.

Mark Bertram asked Wantink if she knew anything about what the SCE people said. Wantink said she had no idea about any of it, but it could not possibly be true and there must be some kind of mistake.

Wantink telephoned two days later and provided a copy of the license (Exhibit 41) from SCE to the seller, S&R Capital Group. The Bertrams read the license, and saw that it was revocable with 30 days' notice, meaning SCE could deny the Bertrams access to their home. The property had no other vehicle access and SCE's revocation of the license would make the property "landlocked." The Bertrams knew the driveway was not built for 40-ton trucks and was not 16 feet wide, as the license required. The license also required the Bertrams to have a million dollars of liability insurance to insure SCE personnel and equipment. Lisa and Mark Bertram testified that if they had been informed that the driveway was on SCE property subject to a license agreement which could block access to the property, they would not have purchased the property.

The first major rain in early March 2000 flooded the Bertrams' driveway, the area under their house, and the garage. The rains lasted on and off for two or three months. The garage flooded each time it rained. Flood water carried debris—bricks, rocks, sticks, horse manure—and deposited that material on either side of the front gates. The first time it happened the Bertrams shoveled away the debris for two hours, in the rain, so the gates could be opened. A couple of days later some workers, Mark Bertram, and a neighbor sandbagged the area to divert water into the street. On later occasions the water broke up the sandbags, preventing the Bertrams from opening their driveway gates because they were blocked by debris. Sandbags prevented use of the McBroom Street entrance.

The same thing happened during the spring rains in 2001, when numerous sinkholes also appeared. The largest one was directly outside the garage, where the driveway caved into a hole that was four or five feet deep.

After spring rains started in 2000, Lisa Bertram talked with Wantink about flooding. Wantink did not tell Lisa that a flooding problem had existed for a long time and did not act surprised at the flooding of the driveway.

Water damaged the white horse fence north of the driveway. The fence was held up by posts anchored in the dirt with cement. Rains eroded the hill, exposing concrete post footings, and caused the fence to slide down the hill.

The February 4, 2000, meeting between Wantink, the Bertrams, and SCE employees included discussion of a temporary entry permit. SCE sent the Bertrams temporary entry permits in March and August 2000.

In a November 14, 1999, letter from Wantink to Sam Sepassi at S&R Capital, Wantink stated that a garage floor was below driveway grade, allowing water to flood the garage. Wantink's letter also stated: "patio planter weep holes are terminated in garage wall[,] allowing flooding of garage;" "waterfall stonework is not sealed, resulting in constant seepage of water under patio slab;" and "grading at rear of house allows ponding

of runoff water.” Lisa Bertram testified that Wantink never communicated this information before escrow closed.

The Bertrams hired Valley Home Inspection to do an inspection on March 11, 2000. The inspection report stated that the house showed evidence of being a move-on from another location. Before escrow closed, Wantink never mentioned the possibility of the house being a “move-on” from another location. The inspection report recommended that the Bertrams verify the engineering of the second story addition to see if it had a suitable foundation. Before escrow closed, Wantink and the Bertrams never discussed whether the foundation was suitable for a two-story house. The inspection report stated that moisture and mud prevented complete inspection of the crawl space, that improper grading toward the house could cause water to enter the crawl space, and that many pier supports sat in mud which could cause settling, structural damage, mold, fungus or wood rot damage if not corrected as soon as possible. The report also described evidence of water flow into the garage floor because of a sloped driveway. Before escrow closed, Wantink never told the Bertrams about flooding at the property.

The inspection report described rainwater from a neighbor’s property caused erosion and unstable grading and sliding at the driveway slide slope. The report stated that an added drain under the driveway was not adequate to carry heavy rain, that rainwater had washed out the concrete fence base at several sections of the fence along the driveway, and rainwater collected at the driveway gate area, causing damage to the gate opener. Before escrow closed, Wantink never informed Bertram of the possibility of flooding due to rains.

The inspection report stated that the upper roof section had fire damage visible from the hall ceiling attic access opening. It stated: “Many roof rafters are charred and should be replaced to code. Complete removal of charred wood should have been verified by city inspectors if the required permits were obtained prior to repair. Check with the seller to verify permits for fire damage. Attic heater should have a work access

plank at the foot to code.” Before escrow closed, Wantink assured the Bertrams that all proper permits for the property had been obtained.

Two months after the February 4, 2000, meeting with SCE representatives, the Bertrams received gate locks from SCE. Wantink told the Bertrams that the Bertrams were to install the locks so SCE could come and go on the driveway.

The Bertrams obtained an estimate from Solender Group of the cost of moving the driveway off SCE’s land. The estimate was almost \$700,000.

The Bertrams later learned of correspondence to Sepassi and to Sepassi’s attorney indicating that Wantink was aware of numerous problems relating to the Wheatland property before and after she became the Bertrams’ real estate agent. These letters indicate Wantink’s knowledge of water problems caused by rain, faulty construction, falsehoods concerning the terms of the SCE-Sepassi license and Sepassi’s failure to sign it, electrical work not done to code, Sepassi’s failure to place an access road in the correct location and his placement of utilities and a driveway on SCE property, and Sepassi’s misstatements and failure to disclose that no easements or any other facts would affect the neighboring property or the value of the Wheatland property. The Bertrams never received copies of Wantink’s letters and Wantink did not tell them about the problems with the Wheatland property referred to in her letters.

Lisa Bertram testified that the Bertrams would not have incurred the following expenses if they had not purchased and moved into the Wheatland property: \$4,672.98 in closing costs; \$11,276.30 in move-in expenses; \$7,604.35 in taxes; \$63,768.75 for mortgage interest; \$3,729.14 for insurance; and \$4,557.83 for maintenance. Lisa Bertram testified to \$9,237.98 in medical expenses for Mark Bertram.

On August 25, 2000, Ellen Wright of SCE wrote to the Bertrams: “If I do not receive an executed copy of the temporary entry permit from you within the next seven working days, I will assume that you are not interested in using Southern California Edison property any longer and you will need to call me . . . to make arrangements to vacate the Southern California Edison property.” Lisa understood this to mean that if the

Bertrams did not sign the temporary entry permit, they would have to remove that driveway and could no longer use it to reach their house, and would have to remove utilities under the driveway, leaving them without water or power.

Between the February 4, 2000, meeting with SCE representatives until the Bertrams moved out in March 2001, the driveway issue was never resolved and the Bertrams continued to use the driveway.

Defendant Wantink, a real estate broker for more than 24 years, has an office, Shadow Hills Realty, in Shadow Hills, California. On September 30, 1999, she received authorization to sell the Wheatland property from Sepassi of S&R Capital. Wantink admitted that in November or December of 1999 she became aware that the driveway to the house at 10451 Wheatland crossed over SCE property. Thus before escrow closed in the sale to the Bertrams, Wantink knew the driveway went onto SCE property but did not communicate this fact to the Bertrams. Wantink testified that during the escrow, she did not think about what governed the buyers' use of the driveway going over SCE property, and did not think leasing that property had anything to do with the driveway.

When Wantink listed the property for sale, Sepassi told her he had a lease of SCE property north of the Wheatland property, and that lease could be transferred to a new owner. Thus Wantink knew a lease pertaining to SCE property existed, but did not know its terms, the property it covered, or its duration. The only thing she conveyed to the Bertrams concerning the lease was its cost, \$80 a month. She knew Sepassi paid \$1,000 when the lease began and wanted that \$1,000 back from the buyers, but she did not tell this to the Bertrams. Wantink did not obtain a copy of the lease until the middle of January 2000, when she talked to Ellen Wright of SCE.

On December 4, 1999, Wantink showed the Bertrams the Wheatland property, which had work yet to be completed. Wantink thought the uncompleted items were obvious, such as the absence of garage doors, but pointed some of them out. Wantink volunteered that a lease of additional property was possible. Wantink told the Bertrams that Sepassi told her a buyer could exercise that lease. Wantink could not recall whether

she told them she had not verified the truth of Sepassi's statement about the lease. Wantink did not tell the Bertrams they should call SCE and check out the lease. Wantink denied telling the Bertrams that the white horse fence along the driveway was their property boundary. Wantink knew SCE lines were present, but denied knowing that SCE's right-of-way was the northern border of the Wheatland property. Wantink prepared a purchase agreement and receipt for deposit for the Bertrams on December 5, 1999.

Wantink admitted knowing, before escrow closed, that the McBroom driveway crossed SCE land. She thought this was obvious, although she could not recall whether she discussed this fact with the Bertrams. She testified that she did not know that entering from Wheatland required crossing SCE land until the February 4, 2000, meeting with SCE personnel. She was shocked to learn at that meeting that the Wheatland driveway was on SCE land and was improperly constructed. Wantink gave the license agreement to the Bertrams when she received it on January 9 or 10, 2000. Wantink was surprised that it was a license; she had understood it to be a lease.

Wantink believed that a 1924 easement covered the SCE property. Wantink had the title company trace out the easement, but the title company did not furnish Wantink with a map showing that easement, and she did not ask for that map. Wantink never told SCE that an easement gave the Bertrams access to their property and thus made a license unnecessary. Wantink never told the Bertrams that an easement provided access to their property. Wantink denied ever discussing the boundary of the Wheatland property with the Bertrams. Wantink's deposition testimony, however, admitted that she had identified the white horse fence next to the driveway as the property line.

Wantink admitted that before escrow closed, she never inquired about the dirt road beyond the driveway out to the McBroom entrance. Wantink denied telling the Bertrams that was their driveway out to McBroom. She did not know who that driveway to McBroom belonged to.

Wantink identified George Cook as a building contractor in Shadow Hills who had done work for Wantink for six or seven years. Before November 14, 1999, Cook prepared a report on the Wheatland property at Wantink's request, so the seller would know what remained to be done. Thus Wantink knew about a flooding problem in the garage; that a waterfall area was not sealed, allowing water to seep under the patio slab; and that grading behind the house allowed ponding of water. Wantink testified that she did not know whether the garage floor problem was corrected before December 12, 1999, when she met with the Bertrams to execute the transfer disclosure statement. On December 12, 1999, she did not tell the Bertrams there was a problem with the garage flooding and that she did not know whether it had been repaired.

Ann Gildersleve worked in the SCE real estate department as a licensing specialist from December 1997 to September 2000. Gildersleve was familiar with the Wheatland property, next to SCE's transmission corridor property. Gildersleve identified Exhibit 40 as an SCE map on which Sepassi drew a roadway to indicate what he wanted to license from SCE. Gildersleve visited the property after she learned someone had a trench to install underground utilities on SCE's property. She told Sepassi he was not authorized to do that work on SCE property and had to remove utilities he had placed within SCE's property. Gildersleve and Sepassi discussed a license. Sepassi's property was landlocked and Sepassi needed SCE's land for a driveway and wanted to pave it. Gildersleve confirmed that to reach the entrance of the Wheatland house required crossing the SCE right-of-way.

Exhibit 41 was a license agreement to allow Sepassi to use the road. Gildersleve testified that the license agreement was not transferable. Gildersleve could not confirm whether Sepassi ever returned a signed license agreement, but testified that SCE never received a fee for the license agreement from Sepassi.

Gildersleve believed it was SCE policy not to grant permanent rights of access to private parties. SCE licenses and temporary entry permits were revocable at will, on 30

days' notice. In practice, however, SCE would try to resolve problems with a licensee before revoking the license.

Gildersleve interpreted a paragraph in the license about easements reserved by Barbara Teeter in a deed recorded March 28, 1924, to mean that the woman who sold the property to SCE reserved some rights. Gildersleve did not know if this easement reserved rights to a driveway across SCE's property. Gildersleve stated that the easement was for existing roads or trails crossing the land in 1924, and the easement reserved for the future the right to construct and maintain streets, roads, pipelines, and gas and sewer lines for public use.

Fred C. Wheaton was a supervisor within Gildersleve's operations group. Wheaton's signature on Exhibit 40, dated October 8, 1999, signified approval of improvements as proposed. Wheaton's approval was the first step for Sepassi to obtain a license.

Ellen Wright worked for SCE as a right-of-way agent since 1996, and was familiar with the Wheatland property and the adjacent SCE right-of-way. Wright took over the license application from Gildersleve. SCE owns title to the right-of-way, which has high-powered transmission lines overhead. Wright identified Exhibit 40 as a survey document by SCE's Survey Department, to be attached to a license. Wright visited the Wheatland property two or three times, and saw the paved driveway from the Wheatland entrance up to the house. Exhibits 40 and 41-10 show the boundaries of SCE's right-of-way and the driveway, part of which crosses SCE's right-of-way corridor. Wright never received a license agreement signed by Sepassi for his roadway and utility access on SCE's property. At some point Wantink informed Wright that Sepassi had sold the property. Wantink told Wright that Sepassi told her the license agreement was transferable, but when Wantink received the paperwork she discovered it was not transferable, and called Wright. Wright scheduled a meeting with Wantink and the new owners on February 4, 2000.

After the meeting, Wright mailed a temporary entry permit, Exhibit 38, to the Bertrams. The temporary permit contained the same specifications and requirements for a driveway, access, and insurance as Sepassi's proposed license, and was also revocable by SCE with no notice period. The Bertrams never signed a temporary entry permit, but continued using the driveway while they lived in the property.

Wright was aware of the 1924 easement. Wright testified that there was an easement on the northwesterly portion of the SCE property, at McBroom Street, but that easement would not give access to the Bertrams to McBroom Street. There was also an easement on the southernmost boundary of the SCE property. Wright was not certain whether that southernmost easement was on the Bertrams' property or on the other side. Wright did not know if the Bertrams' driveway was located where the trail was located in 1924.

Plaintiffs' expert witness Mark MacCarley is an attorney specializing in real estate and a California licensed real estate broker. He was involved in the enactment of Civil Code section 1102 et seq., governing a real estate agent's disclosure to buyers. MacCarley testified about the facts of the sale of the Wheatland property, and about a real estate agent's standard of care and obligations to clients.

MacCarley reviewed the "Transfer Disclosure Statement," Exhibit 2, executed by S&R Capital in 1999 and by Wantink for the sale of the Wheatland property. One disclosure item stated that the sellers were not aware of any walls, fences or driveways shared with another landowner. In the transfer disclosure statement, Wantink stated that the property appeared as the seller represented. After reviewing the facts, MacCarley determined that SCE's property was important to the sale of the Wheatland property. MacCarley's review of the documents and of Wantink's testimony showed that Wantink was aware, before escrow closed, that the driveway to the Wheatland property crossed SCE property.

MacCarley also focused on an agency disclosure document, Exhibit 4, informing buyer and seller whom the real estate agent is working for. Wantink's dual agency

imposed on her a fiduciary duty of absolute loyalty to both buyer and seller. Based on deposition and trial testimony, MacCarley concluded that Wantink was aware that S&R Capital and SCE had an agreement regarding land under the high-tension power lines, and that the driveway from Wheatland crossed SCE land. Wantink knew the agreement between S&R Capital and SCE would not automatically transfer to a buyer, who would have to negotiate a new agreement with SCE. Wantink also knew that the SCE license was only for five years and was not permanent, and cost \$1,000 annually. Wantink failed to verify this license information and obtain the license. The license was critical to anyone buying the Wheatland property, given that it determined whether a buyer had access to the property.

Based on the standard of care and the facts of this case, MacCarley formed the opinion that Wantink breached her fiduciary duties to the Bertrams. MacCarley testified that a real estate cannot merely repeat a seller's statements; once a real estate agent makes a statement concerning the condition of the property, if the buyer decides to buy the property the real estate agent is responsible for the truth of those statements. Wantink described the license but did not provide sufficient detail. Wantink also signed off on the seller's statement that the seller claimed no knowledge or understanding of this license agreement with SCE, even though Sepassi signed the license agreement 10 days before he executed the disclosure statement on September 30, 1999. MacCarley concluded that Wantink breached her fiduciary duty to the Bertrams by not being competent and by failing to verify the seller's statements. Wantink also failed to obtain documents that would have informed the buyers of the license agreement and that the license agreement was revocable by SCE. These facts also led MacCarley to form the opinion that Wantink's representation of the Bertrams did not meet the standard of care required of real estate brokers in California. Ingress and egress to a property is a material fact in any real estate purchase.

Regarding Wantink's November 14, 1999, letter to Sepassi expressing the hope that water problems would be corrected before it really started to rain, MacCarley

testified that Wantink had a duty to share information about water problems on the property with the Bertrams when they prepared their offer to buy the property. Water problems are especially important in hillside areas.

Testimony about the emotional distress Mark Bertram suffered after purchasing the 10451 Wheatland property is summarized in section 1(d) of the “Discussion,” *post*.

ISSUES

Wantink claim on appeal that:

1. There was insufficient evidence to support the judgment.
2. The Wheatland driveway was lawfully on property owned by SCE, based on a 1926 grant deed and a 1924 easement.

DISCUSSION

1. Substantial Evidence Supports the Judgment

a. The Standard of Review

Wantink’s appeal challenges the substantial evidence supporting the judgment as to the four causes of action in which the jury made a finding in plaintiffs’ favor. This court reviews the judgment by resolving all conflicts in the evidence in favor of the respondent and indulging all legitimate and reasonable inferences to uphold the judgment. This court’s power begins and ends with a determination whether any substantial evidence, contradicted or uncontradicted, will support the conclusion reached by the trier of fact. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. The testimony of a single witness, including that of a party, may be sufficient. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134.)

This reviewing court presumes that the record contains evidence supporting a lower court's findings of fact. When an appellant claims that evidence is insufficient to support the judgment, it must demonstrate that there is no substantial evidence to support the challenged findings. In making this demonstration, the appellant must set forth in its brief all material evidence on the point and not simply its own evidence. Unless this is

done the error is deemed to be waived. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 782.) The appellant's brief has not complied with the requirement of setting forth all material evidence.

b. *The Causes of Action for Negligence, Breach of Fiduciary Duty, and Fraud*

Negligence: The Bertrams' negligence cause of action alleged that Wantink breached her duties to the Bertrams to exercise reasonable skill and care in performing her duties by: failing to conduct a competent, diligent visual inspection of the property; failing to disclose deficiencies in the property to the Bertrams; and failing to investigate to insure that her representations to the Bertrams were true and accurate.

Negligence is conduct falling below the standard established by law for the protection of others against unreasonable risk of harm. Its essential elements include (i) a legal duty to exercise due care; (ii) breach of that duty; (iii) the breach as the proximate or legal cause of resulting injury to plaintiff. (*Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023, 1033.) A buyer's broker can be liable for negligence in failing to ascertain the truth of a seller's statements about title, encumbrances, lot size, and boundary lines. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 563; *Wilson v. Hisey* (1957) 147 Cal.App.2d 433, 439.)

Breach of Fiduciary Duty: The Bertrams' cause of action for breach of fiduciary duty alleged Wantink's failure to conduct a competent and diligent visual inspection of the property, which would have revealed defects, and the failure to inspect and disclose defects breached Wantink's fiduciary duty to disclose fully all material facts that might affect the Bertrams' decision to buy the property.

At common law, the broker owes a fiduciary duty to her client requiring the highest good faith and undivided service and loyalty. (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25.) A real estate agent owes a duty to a purchaser of property whom the agent represents to exercise reasonable skill and care for

the principal's benefit in performing agency duties. (*Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1364.)

The real estate agent also has a duty to investigate and verify material facts of the real estate transaction. “ ‘The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision.’ ” (*Field v. Century 21 Klowden-Forness Realty, supra*, 63 Cal.App.4th at p. 25.) This fiduciary duty to investigate material facts of the transaction prohibits the broker from transmitting information received from others to the principal without verifying the information or disclosing to the principal that the information is not verified. (*Salahutdin v. Valley of California, Inc., supra*, 24 Cal.App.4th at p. 562.)

Second, the real estate agent has a duty to disclose material facts of the real estate transaction. “ ‘The Agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. . . . The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.’ ” (*Field v. Century 21 Klowden-Forness Realty, supra*, 63 Cal.App.4th at pp. 25-26.) “Thus, depending on the circumstances, a broker's fiduciary duty may be much broader than the duty to visually inspect and may include a duty to inspect public records or permits concerning title or use of the property[.]” (*Id.* at p. 26.)

Fraud: The Bertrams' fraud cause of action alleged that before execution of the purchase agreement, Wantink knew of defects in the property, represented to the Bertrams in the real estate transfer disclosure statement that the property had no known

defects, and failed to disclose these defects to the Bertrams with intent to induce them to buy the property in reliance on the representations.

“ ‘In addition to the traditional liability for intentional or actual fraud, a fiduciary is liable to his principal for *constructive fraud* even though his conduct is not actually fraudulent. Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.’ [Citation.]

“ ‘[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another *even though the conduct is not otherwise fraudulent*. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary’s motives or the principal’s decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud *even though there is no fraudulent intent*.’ [Citation.]

“ ‘A broker who is merely an innocent conduit of the seller’s fraud may be innocent of actual fraud [citations], but in this situation the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them. [Citation.]’ ” (*Salahutdin v. Valley of California, Inc.*, *supra*, 24 Cal.App.4th at p. 562; italics in original.)

Whether the breach of the real estate agent’s general duty of disclosure constitutes negligence or fraud depends on the circumstances of each case. No clear line establishes when a fiduciary’s breach of the duty of care will be merely negligent or will be constructive fraud. “However, a breach of a fiduciary duty *usually* constitutes constructive fraud.” (*Salahutdin v. Valley of California, Inc.*, *supra*, 24 Cal.App.4th at p. 563; italics in original.)

c. Substantial Evidence Supports the Judgment

The evidence showed that Wantink failed to investigate and to verify information about the Wheatland property, and failed to disclose information about that property to the Bertrams.

Regarding boundaries, Mark Bertram testified that at their first meeting, Wantink answered his question about property boundaries by stating that a white fence along the driveway to the Wheatland entrance was the boundary. Wantink's deposition testimony admitted that she identified the white horse fence next to the driveway as the property line, which contradicted her trial testimony in which she denied making that representation. Wantink did not inform the Bertrams that the driveway was on SCE land, then or ever.

Wantink did point out power lines belonging to SCE, and said: "that land that's adjacent on the other side of the white horse fence that marks your property line is available for lease[.]" She stated that the seller had a lease with SCE, which lease was transferable to whoever purchased the property. The lease cost \$80 a month. Wantink offered to make a copy of the lease available to the Bertrams. Wantink, however, did not tell Mark Bertram that SCE could revoke the lease, that the lease had an insurance requirement, and that construction of the driveway had to comply with SCE's specifications as a condition of the lease.

When Wantink listed the Wheatland property for sale, Sepassi told her he obtained a lease that could be transferred to the new owner after the property was in the new buyers' name. Thus Wantink knew that a lease pertained to SCE property, but Wantink did not obtain a copy of that lease until the middle of January 2000. Before escrow closed, Wantink did not know the terms of the lease, the property it covered, or its duration. The only thing she conveyed to the Bertrams was the amount of the lease, \$80 a month. She knew Sepassi paid \$1,000 when the lease began and wanted that \$1,000 back from the buyers. She did not tell this to the Bertrams.

Wantink admitted that before escrow closed, she never made any inquiry to anyone as to the dirt road beyond the driveway out to the McBroom entrance. Wantink also admitted that in November or December 1999 she became aware that the driveway or dirt road crossed over onto SCE property. Wantink admitted that before escrow closed in the sale to the Bertrams, she knew the driveway went onto SCE property but she did not tell the Bertrams that the driveway went on SCE property. Wantink testified that during the escrow period, she did not think anything about what governed the buyers' use of the driveway over SCE property, and did not think leasing that property had anything to do with the driveway.

Wantink failed to disclose other matters to the Bertrams which she knew or should have known. Wantink had a general contractor, George Cook, prepare a report on problems needing repair and correction at the Wheatland property. Thus Wantink knew about flooding in the garage, that an unsealed waterfall allowed water to seep under the patio slab, and that grading behind the house allowed ponding of water. Her November 14, 1999, letter to a seller, Sam Sepassi, reflected Wantink's knowledge of these three problems. Wantink testified that she did not know whether the garage floor problem was corrected before December 12, 1999, when she met with the Bertrams to execute the transfer disclosure statement. On December 12, 1999, she did not tell the Bertrams there was a problem with the garage flooding and she did not know whether it had been repaired. Lisa Bertram testified that before escrow closed, Wantink never informed the Bertrams of these problems. Flooding problems occurred in the winter and spring of 2000 and 2001.

This constitutes substantial evidence to support the jury's verdict for plaintiffs in their causes of action for negligence, breach of fiduciary duty, and fraud.

d. *Substantial Evidence Supports the Judgment in the Cause
of Action for Negligent Infliction of Emotional Distress*

Several witnesses' testimony supports the verdict in favor of plaintiffs in their cause of action for negligent infliction of emotional distress.

Lisa Bertram testified that the property problems beginning shortly after they moved in caused Mark Bertram to become very depressed. In the spring of 2000 Mark Bertram suffered the first of many panic attacks, which required a psychiatrist's treatment and medication. Lisa and Mark, formerly active and social, stopped going out and socializing with friends. Although they formerly had a good sexual relationship, their sexual relationship ceased. Mark Bertram's psychiatrist treated him with psychiatric medication. Bertram testified to his change of personality after moving into the Wheatland house, his panic attacks, his inability to function properly at work, and to his ceasing to have a sexual relationship with his wife. Michael Rochelle, Bertram's friend and business partner, testified similarly that Mark Bertram's personality changed and his ability to perform his job deteriorated after buying the Wheatland property.

Mark Bertram's psychiatrist, Dr. Cunningham, diagnosed Bertram as suffering from panic disorder, anxiety disorder, and depressive disorder related to the Wheatland property and related litigation. Cunningham placed Bertram on medication. Bertram's panic attacks continued after he moved out of the house. Cunningham doubted Bertram would ever return to his former, confident self.

This evidence constitutes substantial evidence to support the jury's verdict in favor of plaintiffs in the cause of action for negligent infliction of emotional distress.

2. Wantink Has Not Shown That the Wheatland Driveway Was Lawfully on Property Owned by SCE

Wantink claims on appeal that the judgment is erroneous for several reasons relating to a license SCE granted to the seller, S&R Capital, and relating to an easement reserved by grantors of the property forming the SCE right-of-way.

a. The License

Wantink claims that before installing the driveway, the builder of the house that the Bertrams purchased obtained written permission from SCE to build the driveway. Wantink's interpretation of the license is erroneous.

Because Sepassi never returned a signed license agreement and never paid SCE the license fee, the license never became effective. Even if the license had been effective it could not be transferred to the Bertrams when they bought the property, as paragraph 23 of the license stated and as SCE employee Gildersleve and real estate attorney DiTonto testified.

Wantink argues that the license had nothing to do with the use of the Wheatland driveway, and instead related solely to rental of the SCE corridor. The license, however, states its purpose: “Use [MODIFIED]: Licensee will use the Property for vehicular access, utility installation and pasture/grazing purposes only.” Attachments to the license comprise a map of the SCE corridor, and a second version of that map showing a road and proposed gate, with the legend: “License area to S&R Capital Group for vehicular access purposes.” Ample trial testimony showed that the license would have authorized construction and use of a driveway on SCE property to provide vehicular access to the Wheatland property.

Wantink argues that the plaintiffs had the burden of proof regarding the location of the driveway because its location was essential to their claim for relief, citing Evidence Code section 500. Wantink argues that if the driveway was located in accordance with the approval of SCE employee Wheaton, SCE could have no right to object to it. This is incorrect. First, although Wheaton approved the proposed license, the license never became effective. Thus the driveway continued to encroach on SCE’s property without permission and SCE had the right to terminate that illegal use of its property. Second, even if the license had become effective, it was personal to S&R Capital, the licensee, and terminated when the Bertrams bought the property. Third, there was testimony that the signature of Fred C. Wheaton, a supervisor in Gildersleve’s operations group, on Exhibit 40 signified approval of improvements *as proposed*. Wheaton’s approval was only the first step for Sepassi to getting a license. Plaintiffs amply met their burden of proving that the driveway encroached on SCE property, that SCE had the right to stop owners of the Wheatland property from driving over SCE’s property, and that therefore

Wantink should have discovered the existence of the illegal driveway and should have disclosed it to the buyers.

b. *The 1926 Easement*

Wantink also claims that the driveway was on an easement established in a grant deed recorded in 1926. The 1926 grant deed from Luke Houghton and Francis S. Houghton granted a 150-foot strip of land to SCE. The grant deed stated: “The Grantors herein reserve an easement to maintain and use the existing underground water pipe line as now located across said property and also easements to construct and maintain roads not to exceed three (3) in number and not to exceed sixty (60) feet in width across said property in a general northerly and southerly direction to connect with roads on adjoining lands, and to construct and maintain, within the lines of such roads, sewers, telephone lines and pipe lines for water gas or other public utilities, provided, however, that such roads shall be so located and the rights in this paragraph contained shall be so exercised as not to damage or interfere with any of the transmission lines or structures of the Grantee, its successors or assigns, now or hereafter located upon or over the land described herein.”

There was no evidence that the sellers of the Wheatland property built the driveway on an easement. Moreover, placement of the Wheatland driveway did not correspond to the description of the 1926 easement. The 1926 grant deed describes an easement for three roads across the 150-foot strip “in a general northerly and southerly direction to connect with roads on adjoining lands[.]” The Wheatland property driveway does not follow a general northerly and southerly direction; it follows a general easterly and westerly direction. If such an easement existed, Wantink should have verified its existence and disclosed it to the Bertrams before escrow closed.

Wantink argues that the 1926 grant deed is presumed correct, citing Evidence Code section 643.² Wantink does not address whether the 1926 grant deed satisfies all four statutory requirements for assuming its authenticity. Even assuming its authenticity, however, the 1926 deed grants an easement for three roads across the SCE strip in a northerly and southerly direction, while the Wheatland driveway encroaches on the SCE strip in an easterly and westerly direction. No evidence showed that the Wheatland driveway was located to correspond to or was built on a road which existed when the easement was created in 1926. Therefore placement of the Wheatland driveway does not appear to be within the terms of the 1926 easement.

Wantink argues that in a prior complaint brought against SCE, the Bertrams alleged that the 1926 deed granted property to SCE and reserved easements for ingress and egress, and that the Bertrams owned one of these easements. Wantink makes no further argument concerning how the allegation in this complaint binds the Bertrams, proves that a valid easement existed which authorized the placement of the driveway on SCE's land and authorized the Bertram's use of such driveway, or estops the Bertrams from asserting in their case against Wantink that they did not own such an easement. We treat the matter as waived. (*Jimmy Swaggart Ministries v. State Bd. of Equalization*

² Evidence Code section 643 states: "A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it:

"(a) Is at least 30 years old;

"(b) Is in such condition as to create no suspicion concerning its authenticity;

"(c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and

"(d) Has been generally acted upon as authentic by persons having an interest in the matter."

(1988) 204 Cal.App.3d 1269, 1294; *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278.)

Wantink also cites portions of the Bertrams' complaint against SCE as evidence that before the Bertrams filed their complaint against Wantink, the Bertrams knew that the Wheatland driveway was on an easement. Allegations in a prior complaint concerning the parties' beliefs as to the existence of an easement and whether the use complies with the terms of the easement, however, do not provide "documentary evidence" as to the legal validity of that easement. As stated, *ante*, the text of the easement in the 1926 grant deed refutes a claim that the driveway complied with the terms of the easement.

Wantink argues that because the Bertrams failed to obtain a survey of the property, they provided no evidence that there was anything wrong with the location of the driveway. SCE employee Ellen Wright's testimony provides this evidence. Wright visited the Wheatland property and saw a paved driveway from the Wheatland entrance to the residence. Exhibits 40 and 41-10 accurately show boundaries of SCE's property and the path of the driveway, which crosses SCE's right-of-way.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiffs Lisa Bertram and Mark Bertram.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P.J.

ALDRICH, J.